



BEFORE THE STATE BOARD OF **EQUALIZATION**
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
VICTOR 'P. ABEGG) N o . 81A-770-CB
) , 82A-1180

Appearances:

For Appellant: Rev. Victor P. Abegg
O.P.M. Conv.

For Respondent: Timothy Boyer
Supervising Counsel

O P I N I O N

This appeal is made pursuant to section 185931/ of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Victor P. **Abegg** against proposed assessments of additional personal income tax and penalties in the total amounts of \$760.60, \$872.50, and \$937.00 for the years 1978, 1979, and 1981, respectively.

1/ Unless otherwise specified, all section references are to **sections** of the Revenue and Taxation Code as in effect for the years in issue.

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The issue in this appeal is whether appellant was on "the faculty at California State Polytechnic University at Pomona as an agent of a religious community, the Conventual Franciscans, or whether salary paid to him by the State of California was compensation to him for his services and includable in his gross income.

During all relevant times, appellant has been a member of a religious community, the Conventual Franciscans of California, a tax-exempt organization which is an extension of the Order of Friars Minor Conventual. As a member of this religious Community, he has taken solemn vows of poverty and obedience.

For the appeal years, appellant was employed by the State of California as a faculty member of California State Polytechnic University in Pomona, California. Appellant's compensation was set by the state. Similar to other permanent state employees, appellant was a compulsory participant in a pension plan, earned sick leave, earned annual leave, and received other benefits that a state employee earns. Appellant received salaries of \$17,136, \$18,196, and \$23,470, respectively, for the appeal years from the university for his services. In accordance with his vows, appellant endorsed all of his paychecks over to the religious community.

Appellant's duties and responsibilities at the university have been in the areas of teaching, student advising, and curriculum development. It is appellant's assertion that these activities have resulted in ongoing feedback and advising of students who are priesthood and brotherhood candidates for the Franciscans. In 1978, and continuing until 1985, appellant was the chairman of the Commission on Formation and Education for the Conventual Franciscans of California, whereby he directed the program of training and education of young men for the priesthood and brotherhood. In his teaching capacity at the university, appellant was under the day-to-day direction of the university.

Respondent determined that appellant earned the income at issue in his individual capacity and not as an agent for his order. Respondent has withdrawn its assessment of penalties for 1978 in the amount of \$152.12 and 1979 in the amount of \$174.50. Respondent did not assess any penalty for 1981.

Gross income includes "income from whatever source derived," including compensation for services. (Former Rev. & Tax. Code, § 17071, subd. (a)(1); I.R.C. § 61(a)(1).) Since former section 17071 was substantially similar to I.R.C.

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section 61, federal precedent is persuasive in the proper interpretation and application of the California statute. (Meanley v. McColgan, 49 Cal.App.2d 203, 209 [121 P.2d 45] (1942).) It is a fundamental principle of income tax law that income **must** be taxed to the person who earns it, and any attempt by a taxpayer to shift the tax by assigning income earned in his individual capacity will fail. (United States v. Basye, 410 U.S. 441, 449-451 [35 L.Ed.2d 4121 (1973)]; Commissioner v. Culbertson, 337 U.S. 733 [93 L.Ed.1659] (1949).)

This board must determine whether the payments received by appellant from the state university, because of his services on the faculty, were earned by him individually or as an agent of the Conventual Franciscans of California. The general rules of agency are applicable to determine whether or not an **agency** relationship existed. Some of the considerations that may be relevant in the agency determination include the following: (1) the degree of control exercised by the Conventual Franciscans of California **over** appellant; (2) ownership rights between appellant and the Conventual Franciscans of California over the paycheck; (3) the mission of the Conventual Franciscans of California; (4) the connection between the services appellant performed and the mission of the Conventual Franciscans of California; (5) dealings between appellant and the university, such as supervision exercised by the university, and the circumstances surrounding the inquiry and interview for the position; and (6) dealings between the university and the Conventual Franciscans of California. (See Fogarty v. Commissioner, 780 F.2d 1005 (Fed Cir. 1986); Schuster v. Commissioner, 800 F.2d 672 (7th Cir. 1986)); Kircher v. United States, 872 F.2d 1014 (Fed Cir. 1989).)

In Fogarty the court applied the aforementioned six factors to a case where the taxpayer, a Roman Catholic priest, accepted a faculty position as an associate professor at the University of Virginia. The university made the paychecks payable to him individually. Pursuant to the priest's instructions, however, the university deposited the checks in a checking account in the name of the religious order. The priest and the order's provincial treasurer had signature authority for the checking account as agents. The court concluded that the priest had earned the income in his individual capacity.

In Schuster the court also applied the six factors to a case where the taxpayer, a Roman Catholic nun, worked as a nurse-midwife for an agency of the federal government. The nun faithfully turned over her paychecks to her religious order based on a vow of poverty. Checks were drawn on the United

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States Treasury and made payable to her individually. The court concluded that the nun had earned the income in her individual capacity . This conclusion was supported by the following: (1) the order did not exercise day-to-day control over Schuster; (2) Schuster's "paychecks were made payable to her directly and she received personal benefits from employment, such as annual and sick leave; (3) Schuster's employment was not conditioned upon her status as a member of the order; and (4) once employed, she was under the direct supervision and control of the governmental agency.

On the basis of the facts before us, we can only conclude that appellant's situation is indistinguishable from that of the taxpayers in Forgarty and Schuster. Although appellant's acceptance and retention of the faculty position may have been subject to the dictates of his religious superior, his faculty duties were determined by the university. There was no employment agreement between the university and appellant's religious order, and appellant received benefits from the university such as annual and sick leave. On these facts, we hold that appellant cannot exclude from gross income amounts received from the university for the services he rendered as a faculty member.

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ORDER

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Victor P. Abegg against proposed assessments of additional personal income tax and penalties in the total amounts of \$760.60, \$872.50, and \$937.00 for the years 1978, 1979, and 1981, respectively, be and the same is hereby modified to reflect the concessions made by respondent. In all other respects, the action of the Franchise Tax Board is sustained.

Done at Sacramento, California, this 29th day of November, 1989, by the State Board of Equalization, with Board Members Mr. Carpenter, Mr. Bennett, Mr. Dronenburg, and Mr. Davies present.

<u>Paul Carpenter</u>	, Chairman
<u>William M. Bennett</u>	, Member
<u>Ernest J. Dronenburg, Jr.</u>	, Member
<u>John Davies*</u>	, Member
	, Member

*For Gray Davis, per Government Code section 7.9